



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: York International Corporation

File: B-244748

Date: September 30, 1991

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Daniel R. Weckstein, Esq., and William M. Dozier, Esq., Vandeventer, Black, Meredith & Martin, for NORVA Marine Services, Inc., an interested party.

Theodore H. Hoffmann, Esq., Anita D. Polen, Esq., and Jonathan H. Kosarin, Esq., Department of the Navy, for the agency. Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest seeking to overturn decision to set aside a procurement for exclusive small business participation because it was led to believe, in connection with settlement discussions on an earlier procurement, that subsequent procurements would be conducted on an unrestricted basis is denied since inherent in any such agreement is that agencies will act in accordance with the requirements of applicable statutes and the Federal Acquisition Regulation.

2. Contention that set-aside decision was improper is denied, even though the record fails to provide adequate support for the decision at the time it was made, since subsequent experience, including receipt of several proposals from small businesses, justifies the agency's decision to reserve the procurement for small business.

DECISION

York International Corporation protests the Department of the Navy decision to set aside for exclusive small business participation under request for proposals (RFP) No. N00189-91-R-0248, issued by the Naval Supply Center, Norfolk, Virginia, on June 12, 1991, for repairs to the air conditioning plant aboard the USS AMERICA. York argues that the Navy improperly reserved this solicitation for small businesses--thereby excluding York from consideration--and alleges that the Navy

set aside the procurement in bad faith to penalize York for filing an earlier protest with our Office.

We deny the protest.

BACKGROUND

This protest is York's third challenge to Navy solicitations seeking repairs to shipboard air conditioning plants. The repairs on the AMERICA covered by the instant RFP were initially part of a larger "umbrella-type" indefinite-quantity requirements solicitation issued as RFP No. N00189-90-R-0194, which sought air conditioning repair services for Naval vessels in the Atlantic Fleet. When award under the earlier solicitation was made to NORVA Marine Services, Inc., York filed both an agency protest and a protest with our Office. Although the Navy denied York's agency-level protest, it apparently reconsidered its position after York protested to our Office on February 15, 1991, and subsequently concluded that both the statement of work and the evaluation of offers were flawed.

Based on its conclusions about the procurement and the award to NORVA, the Navy attempted to obtain a settlement with York whereby York would withdraw its protest, NORVA would continue to perform the requirements contract for 1 year, and the Navy would issue a new solicitation for the required services. When these negotiations proved unsuccessful, the Navy terminated NORVA's contract and requested that our Office dismiss York's protest as academic. Since NORVA's contract was terminated, and the underlying solicitation canceled, York withdrew its initial protest on April 9. Accordingly, we closed our file on April 10 without issuing a decision on the merits of York's protest.

On April 30, the Navy published a notice in the Commerce Business Daily (CBD) announcing its intention to issue a new solicitation for its Atlantic Fleet air conditioning repair requirements, and advised potential offerors that the procurement would be set aside for small businesses. In response to the CBD notice, York, on June 27, again protested to our Office. In this second protest, York sought to reinstate its previously withdrawn challenge of award to NORVA--York claims it would not have withdrawn that protest had it known that it would be barred from participating in future procurements--and to contest the Navy's decision to procure the repair services pursuant to a small business set-aside. On July 1, our Office dismissed York's protest as premature because the Navy had not yet issued the solicitation for the requirements contract.

In the meanwhile, the Navy, on June 12, issued the instant solicitation for repair of the air conditioning system on the AMERICA. In a conference call between representatives of York, the Navy, and this Office regarding the dismissal of York's second protest, the Navy agreed that the solicitation for repairs on the AMERICA would have been included in the broader requirements solicitation had it been issued.^{1/} On July 11, York filed the instant protest, alleging that the decision to set aside the repair services for the AMERICA was improper and was part of an ongoing bad faith effort to exclude York from competing for the Navy's air conditioning repair needs.

DISCUSSION

York alleges that it was led to believe that if it withdrew its initial protest, it would have an opportunity to compete for the Navy's future repair requirements. Although York never claims that the Navy explicitly stated that future procurements would be conducted on an unrestricted basis, York points to statements made by the Navy during the unsuccessful negotiations prior to York's withdrawal of its initial protest that, York argues, led it to conclude that it would be eligible to compete for future contracts.

The Navy responds that its decision to conduct this procurement as a small business set-aside was not made in bad faith, and that reserving the procurement for small business is mandated by Federal Acquisition Regulation (FAR) § 19.502-2(a) (small business set-asides required when the contracting officer reasonably determines that (1) offers will be received from at least two responsible small businesses; and (2) awards will be made at fair market prices). In addition, the Navy argues that it never reached an agreement with York regarding future repair requirements, and that even if it had, such an agreement could not properly include a commitment to take actions otherwise barred by statute or regulation.

Agreements on Future Procurements

For our purposes, it is immaterial whether York and the Navy reached any agreement on future procurements. Although the record supports the Navy's contention that it never agreed with York on this issue, the Navy's actions clearly contributed to York's expectation that it could participate in future repair procurements. The dispute here, however, derives from either York's failure to consider the impact of

^{1/} To date, the Navy still has not issued the solicitation it advertised on April 30.

procurement policy regulations and statutes on future solicitations, or its assumption that agency contracting officials could waive the application of those rules pursuant to a settlement agreement. However, as we have previously held, such expectations about future procurements may not reasonably include an assumption that agencies will disregard statutory and regulatory requirements. Techplan Corp., 68 Comp. Gen. 429 (1989), 89-1 CPD ¶ 452.

In our decision in Techplan, a case involving facts almost identical to those here, our Office denied a protest seeking to require an agency to conduct an unrestricted procurement in a situation where there may have been a settlement agreement in a prior protest promising future unrestricted procurements. We specifically held that inherent in such agreements is that future procurements will be conducted in accordance with applicable statutes and regulations, and that agencies cannot prospectively agree to conduct unrestricted procurements under conditions where the FAR mandates a small business set-aside. Id.

York recognizes the applicability of our prior decision in Techplan, but contends that Techplan is legally incorrect and should be reversed. According to York, the rule in Techplan discourages settlement of disputes, encourages sharp agency practices, and, in this case, permitted the Navy to act in bad faith to exclude York from future procurements.

We disagree with York's assessment of the impact of Techplan. The integrity of the government procurement process requires that contracting officials not be permitted to enter into ancillary agreements with individuals or companies promising to disregard applicable government-wide statutes and regulations. If contracting officials otherwise lack the authority to waive such requirements, we fail to see why it is appropriate to sanction their waiver in the context of a settlement agreement. See Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

In addition, we do not believe the rule in Techplan offends the strong public policy supporting settlement of disputes. While we are fully supportive of settling contract disputes, the Techplan rule establishes a clear limit on the extent to which agency officials can promise to take action on behalf of individual parties. Such clarity strengthens the settlement process rather than weakens it. Thus, one of the benefits of the rule in Techplan is the certainty it offers to all

parties; such agreements will not be enforceable if they fail to comply with applicable statutes and regulations.2/

Since we affirm our position in Techplan, we deny York's contention that the agency decision to set aside this procurement must be overturned because of York's expectation that the Navy would conduct future procurements for these requirements on an unrestricted basis. Whether York's assumption that it would be allowed to participate in future procurements originated from failing to consider the possibility that future circumstances might require the agency to set aside the procurement or from an expectation created during settlement discussions--or even an explicit representation by Navy officials--that such requirements, should they apply, would be overlooked, we will not overturn the Navy's set-aside decision on these grounds.3/

The Set-Aside Decision

York next claims that the Navy lacked a reasonable basis to reserve this procurement for exclusive small business participation. As explained above, FAR § 19.502-2(a) requires agencies to set aside procurements when the contracting officer reasonably determines that (1) offers will be received from at least two responsible small businesses; and (2) awards will be made at fair market prices. According to York, the Navy had no reasonable basis to conclude that the conditions in the FAR were met here, and the Navy has failed to provide sufficient evidence in the record to support its conclusion.

2/ For example, our Office upheld a protest of a sole-source award where an agency justified its failure to conduct full and open competition on the basis that it entered a settlement agreement promising the award of a contract as a quid pro quo for abandoning a threatened contract claim. Earth Property Servs., Inc., B-237742, Mar. 14, 1990, 90-1 CPD ¶ 273, aff'd, B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

3/ A corollary to York's premise here is that York was somehow injured because it withdrew its initial protest against award to NORVA in response to an expectation that it would be able to participate in future procurements. In fact, York was not injured by withdrawing its protest because we would have dismissed the protest as academic since the underlying solicitation was canceled. See Morey Mach., Inc.--Recon., B-233793.2, Aug. 3, 1989, 89-2 CPD ¶ 102. At that point, York's remaining option would have been to challenge the Navy's decision to cancel the RFP as lacking a reasonable basis.

As a general rule, the decision whether to set aside a particular procurement is within the discretion of the contracting agency. American Cyanamid Co., B-230044 et al., Apr. 7, 1988, 88-1 CPD ¶ 350. However, when a protester alleges that an agency has failed to consider information that should cause it to decide against setting aside a particular procurement, we will review the information and the set-aside decision. See DISA Elecs., 62 Comp. Gen. 271 (1983), 83-1 CPD ¶ 306, aff'd, B-206798.2, May 23, 1983, 83-1 CPD ¶ 545 (protest was sustained where agency set-aside decision was initially reasonable, but in subsequent years the agency failed to consider information mitigating against continued set-aside of requirements).


Although York would have us conclude that the Navy's motivation for these decisions is a bad faith effort to punish York for filing its initial protest and for failing to settle the protest in a way that satisfied the Navy, we will not reach such a conclusion without a showing of specific intent to harm the protester. See NFI Mgmt. Co., 69 Comp. Gen. 515 (1990), 90-1 CPD ¶ 548. In fact, for our purposes, it is not necessary to decide whether the Navy acted in bad faith, although there appears to be insufficient evidence here to reach such a conclusion; rather, since FAR § 19.502-2 is specific about the requirements for setting aside requirements for small business, the reasonableness of a set-aside decision is independently verifiable regardless of the motivation of individuals within the agency. In short, even if York succeeded in showing that Navy officials were motivated by bad faith, it is conceivable that the set-aside decision, nonetheless, has a reasonable basis.

The Navy offers only the most cursory of explanations for its decision to set aside this requirement. Specifically, the Navy provides sworn statements, prepared in response to the protest, by both the contracting officer and the Naval Supply Center's Deputy for Small Business, in which both individuals state only that there was "a reasonable expectation that offers would be received from at least two responsible small business concerns at fair market prices." While the contracting officer offers no support for her conclusions, the small business representative states that she "was aware of at least three small businesses capable of performance." This record, consisting of only the bare assertion that the determination was based on a reasonable expectation of small

business participation, provides no basis upon which to conclude that the decision, when made, was reasonable.4/

The Navy's failure to adequately support the set-aside decision at the time it was made is particularly troubling here since the record, when viewed as a whole, could suggest that the Navy would like to avoid doing business with York, a perception clearly held by York. Nonetheless, as a matter of policy we will not disturb a set-aside decision when subsequent events show that sufficient small business participation justifies the decision. Litton Electron Devices, 66 Comp. Gen. 257 (1987), 87-1 CPD ¶ 164 (protest against a set-aside decision denied where the decision lacked a reasonable basis at the time it was made, but the agency later received indications of interest from two small businesses). Here, the record shows that several small businesses requested copies of the solicitation, and five of them ultimately submitted proposals.5/ Given these circumstances, and the public policy favoring small business set-asides, we conclude that despite the questions raised concerning the Navy's motivation, overturning the decision to set aside this procurement for exclusive small business participation would unnecessarily invalidate a procurement that, given subsequent experience, appears to have generated sufficient small business interest to support a set-aside. Id.

The protest is denied.


for James F. Hinchman
General Counsel

4/ The conclusions by the contracting officer and the small business representative in their statements that their decision was reasonable, does not make it so. Rather, the facts offered in support of a decision elevate its status to one that can be reviewed and found reasonable. Further, the statement of the small business representative that she was aware of three small businesses capable of performing gives little insight into whether those businesses are willing to submit offers, and why they did not submit offers in response to the earlier related procurement.

5/ At least one of the proposals, however, may be a mere courtesy offer given the rounded numbers and prices approximately four times higher than NORVA's.